United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING EN BANC

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- against -

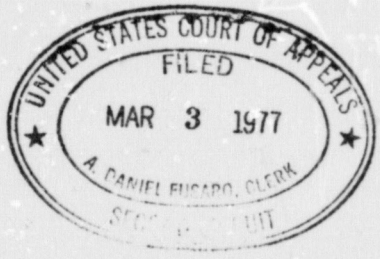
CECIL ROBINSON,

Appellant

Docket No. 76-1153

BRIEF FOR APPELLANT ON REHEARING EN BANC

APPEAL FROM A JUDGMENT OF
CONVICTION RENDERED IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
NEW YORK



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THE COURT, IN THIS SINGULAR, VERY CLOSE CASE, ERRED IN ADMITTING EVIDENCE OF THE JULY 25 GUN, BECAUSE ITS PREJUDICIAL EFFECT FAR OUTWEIGHED ITS PROBATIVE VALUE, AND BECAUSE THE RAVICH CASE DISCOURAGES, RATHER THAN PERMITS, SUCH EVIDENCE IN A CASE WHERE THE PROOF IS FAR FROM OVERWHELMING. MOREOVER, THE COURT'S CHARGE ON THE GUN WAS TOO VAGUE TO BE OF ANY ASSISTANCE TO THE JURY OR TO ASSURE THAT THE JURY DID NOT MISUSE SUCH EVIDENCE.....27

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TABLE OF CASES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, :

Appellee, :

- against - :

CECIL ROBINSON, :

Appellant :

ISSUES PRESENTED

1. Whether the Court, in this singular, very close case, erred in the admitting the evidence of the July 25 gun, because its prejudicial effect far outweighed its probative value, and becaus the Ravich case discourages, rather than permits, such evidence in a case where the proof is far from overwhelming. Also, whether the Court's charge on the gun was too vague to be of any assistance to the jury or to assure that the jury did not misuse such evidence.

2. Whether the failure of the government to disclose that Simon and Brown had met and that Garris had also been present permitted the prosecutor to argue a powerful untruth in his summation, to wit, that only appellant knew Brown. Also, whether the mid-deliberations stipulation failed to cure this injustice, for appellant remained deprived of his rights to develop and confront these late-revealed facts and his right to argue from such facts.

3. Whether the prosecutor's summation improperly shifted the burden of proof to appellant on the issue of alibi.

4. Whether the Court erred in not promptly revealing to counsel the content of the juror's note, in not answering the juror's inquiry, and in giving, instead, a second Allen charge.

STATEMENT PURSUANT TO RULE 28(a) (3)

A. Preliminary Statement

This en banc appeal is from a judgment of the United States District Court for the Southern District of New York, (Bryan, J.), rendered March 5, 1976, convicting appellant, after trial by jury, of the crime of bank robbery [18 U.S.C. §2113(a)] and sentencing him to twelve (12) years imprisonment.*/

Appellant is presently incarcerated pursuant to the judgment herein. Timely notice of appeal was filed and this Court, on April 6, 1976, appointed Jesse Berman, Esq., as counsel on appeal, pursuant to the Criminal Justice Act.

This appeal was originally argued on June 18, 1976, before a panel of this Court (Oakes, Gurfein and Mansfield, JJ.), and on November 1, 1976, after four and one half months of deliberation, that panel, with one judge dissenting, reversed the judgment of conviction herein and remanded for a new trial. United States v. Cecil Robinson, 544 F.2d 611 (2d Cir. 1976). The panel held in "[t]his singular case"..."[a]fter a review of

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*/ Appellant was tried twice on this indictment.

His first trial, on November 20,24,25,26,28 and 29, 1975 ended, after three days of jury deliberations, in a declaration by the Court of a hung jury and a mistrial. The minutes of that first trial will be referred to as T-I.1a through T-I.45a (morning session, 11/20/75) and T-I.1 through T-I.462.

Appellant's second trial, on January 21,22,26,27,28 29 and 30, 1976, will be referred to as T-II.1 through T-II.1049.

Pre-trial conferences were held on October 24, 1975, January 8, 1976 and January 19, 1976.

the evidence" (id. at 613), that the admission at appellant's second trial of testimony regarding his possession of a handgun when arrested ten weeks after the bank robbery was an error which affected the judgment.

In its decision, the panel also criticized the trial Court for not revealing to counsel the contents of a juror's note which revealed "a strong reasonable doubt" (id. at 620-621),*/ and f giving a second Allen charge after the Court had become aware of this "lone holdout" situation (id. at 620, n.14). The panel, however, specifically did not rule on these points, in view of its reversal of the judgment on the gun issue.

Similarly, the panel, in view of the reversal on the gun issue, specifically did not reach the points which appellant had raised and again raises now with regard to the Brady v. Maryland [373 U.S. 83 (1963)] issue**/and to the improprieties in the prosecutor's summation ***/(id. at 621, n.15).

On December 16, 1976, the government petitioned for rehearing with a suggestion for rehearing en banc.

That petition, which appellant, of course, was not permitted to answer in any way,****/, gave this Court a grossly distorted view of the panel's decision, giving the false impression that the panel had reversed on the gun issue as an

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*/ See POINT IV, infra.
**/ See POINT II, infra.
***/ See POINT III, infra.
****/ Rule 40(a), F.R. App. Proc.

isolated academic evidentiary question decided in a clinical, factual vacuum, rather than in the context of all the facts in this "singular", very close case. The government's petition, for example, deliberately made no mention whatsoever of the fact that appellant had been tried twice on this charge, or that at his first trial (which ended in a hung jury), the trial judge refused to admit the very same evidence of the gun.*/

Similarly, the government, in its petition, neglected to mention that, at the second trial (from which this appeal was taken), the Court failed to disclose the contents of the juror's note, or that the panel's decision had criticized the Court for that failure. Nor did the government deem it appropriate in its petition to give this Court a full picture of this case by telling this Court anything at all about the still-unresolved Brady and summation problems.

Finally, in its petition, the government misled this Court in its statement of what the evidence had been on the specific issue of what type of gun, if any, was used by the robber in question during the bank robbery. The petition states that the .38 caliber handgun which appellant possessed when arrested ten weeks after the robbery was:

> ...of a kind that, according to other testimony at trial, had been used by Robinson in the...bank robbery.....
> (Petition, at p. 2)

*/ The panel opinion correctly noted that, apart from the fact that the gun evidence was admitted only at the second trial, The government does not suggest that there was any relevant substantive variance between the proof submitted at the first trial and that introduced in the trial below.
544 F.2d at 614, n.3.

And the petition also refers to:

> ...Simon's testimony that two .38 caliber pistols had been used in the robbery....
> (Id. at p. 3)

But the panel, in its opinion, specifically found "no direct testimony" in the record on the question of whether "a .38 was actually used in the robbery" (544 F.2d at 617, n.8), and there was no testimony whatsoever at trial as to the type of gun, if any*/, used by the robber alleged to be appellant.**/

After reviewing the incomplete and misleading statement of facts in the government's petition, this Court, on February 17, 1977, voted to grant reconsideration en banc.

B. Statement of Facts

On May 16, 1976, the 177 East Broadway branch of the Bankers Trust Company was robbed by four men. Three of the robbers can be seen in the bank surveillance films: (1) a man dressed in black, wielding a shotgun, (2) a man dressed in a white coat, wearing glasses, and (3) a man dressed in a shorter white coat, wearing a hat (T-II.67,8). The fourth robber remained near the door, out of the range of the camera, and does not appear in the bank surveillance film.

The robbers made their escape, and none of the weapons were ever recovered, nor was any of the approximately $10,000 which was taken from the bank, including $750 in marked bait money, ever recovered.

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*/ The bank surveillance photos never show that particular robber in possession of any gun, and "none of the eight eyewitnesses who testified as to their observations of the robbery identified any guns other than the shotgun wielded by Simon" (Id.).

**/ Simon's testimony was only that Edward Garris had a .38 on the day before the robbery (T-II.528-9).

On June 17, 1975, Allen Simon and Carson Corley were arrested and charged with the instant bank robbery.

On June 27, 1975, Simon was indicted (75 Cr. 635) for his participation in the instant robbery. Simon's three-count indictment charged him with bank robbery, armed bank robbery, and use of a firearm (the shotgun) in the commission of the robbery.

On August 19, 1976, Simon pleaded guilty, before Judge Duffy, to counts 1 and 3 of his indictment, and on September 18, 1975, Judge Duffy sentenced Simon to eighteen (18) years imprisonment.

Meanwhile, on July 25, 1975, 10 weeks after the bank robbery, appellant Cecil Robinson was arrested and charged with this bank robbery.*/ The government's theory was that appellant was the robber in the white coat and hat in the surveillance photos. When arrested on July 25, appellant was allegedly in possession of a gun.

On August 4, 1975, appellant was indicted, together with Edward Garris, for conspiracy to rob the bank (Count 1), for robbing the bank (Count 2) and for using arms while robbing the bank (Count 3).**/

(1) The First Trial

Appellant pleaded not guilty, and his first trial (November 20-29, 1975) before Judge Duffy ended in a hung jury,

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*/ Appellant has now been incarcerated continuously since July 25, 1975, a period of almost two years.

**/ Simon, who did not testify in the grand jury, was named as an unindicted co-conspirator.

with the final vote at 8-4 in favor of conviction.

At that first trial, the government was represented by Mr. Hoskins, who attempted, unsuccessfully, to persuade Judge Duffy to allow the July 25 gun into evidence. The government's initial theory for offering the gun was that it showed consciousness of guilt:

> MR. BERMAN: Mr. Hoskins told me that the theory upon which - I will try to state this as fairly as I can - upon which he intended to offer this gun, is to demonstrate, I suppose, consciousness of guilt in that when the officers didn't identify themselves as officers, Mr. Robinson allegedly made some move to take this gun out of the bag that it was in.
>
> I think that is a fair statement of the theory.
>
> THE COURT: Is that accurate?
>
> MR. HOSKINS: Yes, that is accurate.
>
> (Pre-trial Conference of 10/24/75, p. 11)

Judge Duffy noted that the government was "going to have a hard time getting that in" (id.).

On the morning of the first day of the first trial, the government shifted its theory on the admissibility of the July 25 gun: It now argued that the gun was probative of appellant's "opportunity or preparation to commit the crime charged" (Gov's. Memo on Gun, p.3). The government cited United States v. Ravich, 421 F.2d 1196 (2nd Cir. 1970), where this Court found the admission of guns which were not necessarily involved in the crime, harmless, given the other "overwhelming evidence" in that case. As to instant case, however, the government conceded that:

> Far from its case being overwhelming, the government cannot produce a single bank employee or bank customer witness who can identify the defendant as one of the robbers.
>
> (Govt's. Memo, supra, p.3) (Emphasis added)*/

Judge Duffy observed that:

> I am here to try a bank robbery case, not a Sullivan Law violation.
>
> (T-I.3a)

At the first trial, after the first eight witnesses had testified, Judge Duffy ruled that the July 25 gun could not come into evidence (T-I.140).

At that trial, the government claimed that the robber in the white coat and hat, visible in the background in some of the surveillance photos, was identifiable as appellant. Simon became a witness for the government and, in return for the government's support on his upcoming motion to reduce his 18-year sentence, Simon testified that appellant was the robber in the white coat and hat, that the robber in the white coat and glasses was "Kareem", and that Garris was the robber by the door. It was also stipulated that one of appellant's fingerprints was found in the stolen getaway car, which had been abandoned by the robbers and found by the police shortly after the robbery.

The defense, however, produced Otis Brown, the registered owner of the stolen getaway car, who explained that appellant was a friend and schoolmate of his and that appellant had been a passenger of Brown's, in Brown's car, on several occasions

*/ See also the prosecutor's statement at T-I.45a, that the government's case "is not overhwelming" (emphasis added). Of course, in its petition to this Court for rehearing en banc, which appellant was not permitted to answer, the government took the liberty of claiming that its evidence "overwhelmingly pointed to Robinson's guilt". Petition, at p.15, footnote.

shortly before the car was stolen. And the government's own FBI fingerprint expert testified that such a fingerprint might have remained in the car after having been placed there months before the robbery.

The government admitted that the revelation, at trial, that Brown knew appellant, "was a surprise" (T-I.327), but the government argued that Brown did not know Simon, Garris or "Kareem", and since appellant did know Brown, the car must have come to the robbers via appellant (T-I.327-8).*

The jury at the first trial deliberated for three days and ultimately hung, 8-4 for conviction.

(2) The Second Trial

Prior to the second trial (January 21-30, 1976), Simon, Simon's lawyer, and some third person, all made Rule 35 application to reduce Simon's 18-year sentence. Judge Duffy denied the third-person application, bur reserved decision on the motions by Simon and Simon's lawyer. Appellant's re-trial was assigned to Judge Bryan, and appellant's counsel cautioned the government not to create the impression, at the second trial, that Simon no longer had a pending Rule 35 motion (Pre-Trial Conference of 1/8/76, p.31), which nonetheless was just what the prosecutor later attempted to do (T-II.463-467, 499-504, 506).

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*/ In fact, the government at that point already knew, from Simon, that Simon knew Brown prior to the robbery and that Garris had also seen Brown prior to the robbery, but appellant did not learn this until after the jury at the second trial had commenced deliberations. See POINT II, infra.

During the interval between the two trials, the government revealed that it had failed to disclose to the defense that photographs of 42 different individuals had been shown, prior to the first trial, to the various eyewitnesses, and that several of the witnesses had identified or chosen photos of several other suspects (other than appellant, Simon or Garris). Mr. Edwards, the then Chief of the Criminal Division, who was in charge of the case just prior to the second trial, conceded that these facts "should have been turned over sooner" (minutes of 1/8/76, p.21). After a hearing on appellant's motion to dismiss, the Court found that "the material should have been turned over under Brady" and that the government had been guilty of "bad judgment" and "misjudgment" (T-II.152). The Court ruled, however, that "[t]he remedy in most cases of this nature is a new trial. The defendant is having a new trial", and it denied appellant's motion to dismiss the indictment (T-II.153).

At the final pre-trial conference (January 19, 1976), the government, now represented by Mr. Sagor, renewed its attempt to offer the July 25 gun. Sagor claimed that he had "been able to develop recently further evidence" demonstrating for the first time that there was a .38 used in the bank robbery (Conference of 1/19/76, p.66). However, Sagor's only source for this allegedly "recently developed" evidence was Simon, and it was Simon who had, in fact, told precisely the same thing to Hoskins prior to the first trial.*/ Sagor argued that the July 25

*/ Government's Exh. 3556 at the first trial (Hoskins' notes of his interview with Simon((3500 material) contained a statement that: "AE [Garris]-brought shotgun 20 gauge [and] .38". (T-II.385)

gun should come in "to show that [appellant] was equipped to commit the very crime he was charged with" (id. at 67). Appellant argued that Sagor was in effect asking Judge Bryan to reverse Judge Duffy's prior ruling on the same facts (id.at 68). The Court reserved decision. On the first day of the re-trial, Sagor again sought to offer the July 25 gun, arguing this time that the bank robbery had been committed with "the same gun and weapon that Mr. Robinson had within about two months" (T-II.167-7), (emphasis added). Again the Court reserved decision.

Henry Kohn, the bank manager, testified that the bank was robbed at 9:55 a.m. on May 16, 1975. The robbery took less than 5 minutes; a gun went off, once, wounding Mrs. Aponte, a teller; $10,122 was taken, $750 of which (75 - $10 bills)was in marked bait money; none of the money was ever recovered. The surveillance camera did not begin operating until one minute after the shot had been fired. There were 10 employees and five or six customers present during the robbery.

Kohn saw three robbers: the one with the shotgun and the two with white coats. The robber with the white coat and hat wore gloves during the robbery, and the gloves were visible in the surveillance photos (T-II.238-240). Kohn said that the robber with the white coat and hatweighed 150-155 lbs, but Kohn said he could not identify him (T-II.242-3, 286-7).

Prior to the shooting and prior to the commencement of the robbery , while things were still calm, Kohn saw the robber with the white coat and hat seated on a chair near Kohn (T-II.797),

but no law enforcement official had ever shown Kohn a photo of appellant (T-II.798). On June 12, 1975, FBI Agent McLaughlin, the case agent, had shown Kohn some photo spreads, and it was stipulated that Kohn had chosen a photo of one Carson Corley as "very strongly resembl[ing]" the robber with the white coat and glasses (T-II.801, 803), whom Simon had insisted was "Kareem".

Kohn never identified appellant.

Linna Lewis, a teller at the bank, testified that she saw the robber with the shotgun and the two robbers in white coats. Sagor tried, unsuccessfully, to ger her to say that the robber in the white coat and hat was carrying a gun:

> Q: Do you remember the differences, if any, between the two men that jumped over the counter? What one was wearing as opposed to the other, if you remember?
>
> A: One was wearing a hot and the other one--
>
> Q: Are these the three men that you remembered - I'm forgetting what you said. Did you say one was carrying another gun?
>
> MR. BERMAN: She didn't say that.
>
> THE COURT: She did not. (T-II.392).

Richard Hall, another teller, who never identified appellant, testified that he saw each of the four robbers (T-II.404-5) and that on May 21, 1975, Agent McLaughlin had shown him photo spreads aimed at each of the four robbers (T-II.411-2). Hall chose four photos, one for each of the four robbers, including someone whom he chose as resembling the robber in the white coat and hat (T-II.413, 419). No law enforcement official had ever shown him appellant or any photo of appellant (T-II.414-5).

Janet Fishman Baumgarten, another teller, who never identified appellant, saw the robber with the white coat for about ten seconds (T-II.431).

Eugenia Barone (called by the defense), another teller, testified that she never saw the robbery in progress: "I didn't see anything. I stayed facing the wall"(T-II.810). Nevertheless, on May 21, 1975, the FBI showed her photo spreads, told her to "choose anybody" (T-II.816), and she actually chose one suspect (not one of the defendants) as resembling the robber with the shotgun (T-II.814).

Gerald McGivney (called by the defense), a bank officer eyewitness, who never identified appellant, was shown photo-spreads by the FBI, testified that he was never shown a photo of appellant (T-II.825).

Evan Lee (called by the defense), another teller who never identified appellant, testified that he saw the robbery happen (T-II.830), but that he was never shown a photo of appellant (T-II.834).

Wyman Li (called by the defense), an assistant manager eyewitness, who never identified appellant, testified that he saw the robbery take place (T-II.836), but that he was never shown a photo of appellant (T-II.847).

Li heard the robber with the shotgun call one of the other robbers "Tonto" (T-II.837).

Renele Gray could not be located, but it was stipulated that she was a customer in the bank and a witness to the robbery, and that on June 12, 1975, Agent McLaughlin showed her a photo

spread from which she chose Carson Corley as "very closely resembling" one of the robbers who wore a white coat (T-II.854-5).

Police Officers Ring, Branfine and Doriand established that Otis Brown's car, the getaway vehicle, was found at Avenue A and East 10th Street, 20 minutes after the robbery.

FBI Agent Michael Kilgallen dusted Brown's car for fingerprints and lifted one of appellant's prints from the right rear cigarette lighter panel (T-II.317), and four of Garris' prints from parking trickets and Black Muslim literature found in the car (T-II.324).

Otis Brown (called as a government witness at the trial), identified the getaway car as his own car. Brown was a laboratory technician at Harlem Hospital and a student in medical technology at Bronx Community College, as part of a work-study program run by the Public Service Careers Program [PSCP]. He had met appellant in PSCP in 1974 and the two had wroked together at Harlem Hospital for about a year (T-II.341-2). Brown denied ever seeing Garris, and did not know anyone by the name of Allen Simon (T-II.353-4).

On May 16, 1975, Brown learned that his car had been stolen; he had never given the keys or permission to anyone.

Appellant had ridden with Brown, in Brown's car, to and from Bronx Community College, about half a dozen times in April and May of 1975, prior to May 16, 1975 (T-II.346-8, 354). Brown and appellant had both been in the same trainee program in PCSP in the spring of 1975 and both had definitely attended Bronx Community College together that spring (T-II.349,351,355-7).

At some point during that spring, appellant was transferred from his job at Harlem Hospital to a position at Gouveneur Hospital. After that date, Brown continued to give appellant rides from Bronx Community College, dropping appellant off at appellant's home on a number of occasions (T-II.349,350,355). On several occasions, when there were other passengers in the car, especially women passengers, appellant would ride in the back seat (T-II.361-2, 364).

FBI Agent Charles Bookstein, the government's fingerprint expert, testified that on August 18, 1975 he made the identificati of appellant's print on the right rear cigarette lighter panel of Brown's car (T-II.366-7).

Bookstein could not determine how long prior to May 16, 1976 appellant's print had been placed there (T-II.368). Bookstein testified:

> There is no scientific means to determine the age of a latent, that is, how long the particular print was on a particular surface.
> (T-II.367)
>
> Q: Assuming nobody tried to clean off a print and assuming nobody...covered it up, if we limit ourselves to temperature and dust conditions, on metal, a print like that could last two months in the spring?
>
> A: It's possible, two months or longer.
> (T-II.370-1)
>
> ***
>
> Q: If nobody brushed anything up against the print strongly enough to destroy it, in New York, in the spring, on metal, as we described it, and if no one made a deliberate effort to erase the print or smudge it, it may remain indefinitely, couldn't it?
>
> A: That is possible, yes.
> (T-II.371)

William D. Purcell, of the personnel department of Gouveneur Hospital, testified that appellant worked a three-day-

a-week schedule at Gouveneur Hospital from April 11, 1975 until June 16, 1975 (one month after the robbery). (T-II.451). Appellant was absent from work on May 15 and 16, and was present on May 20, which was his next required workday, and was present all three workdays of the following week (T-II.452-5).

Purcell confirmed that appellant was in the work study program, working part-time and going to school part-time. The entry "registration" for the last day of the work week of June 10 indicated that appellant had gone to register at school for summer classes (T-II.457).

Allen Simon, who had pleaded guilty to being the robber with the shotgun, testified against appellant, pursuant to a written agreement which Simon had worked out with the government in November, 1975, after he had received the 18-year sentence (T-II.460).

Simon had weapons convictions in 1969 and 1970 and narcotics convictions in 1969. He had been a heroin and cocaine user and a heroin seller. He had in the past violated the terms of his bail and had also violated the terms of his conditional discharge. He had served 12 of the 29 years of his life in jails (including Sing Sing, Comstock, Green Haven, Rikers Island, the Brooklyn House of Detention, Dannemore, Leavenworth, West Street and MCC), and was, at the time of appellant's re-trial, serving the 18-year sentence imposed by Judge Duffy, with his Rule 35 motion still pending.*/

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*/ After appellant's re-trial, Judge Duffy cut Simon's sentence down to ten years.

He testified that appellant was the robber in the white coat and hat, that Garris, who was known as "Allah Equality" ("AE"), was the robber near the door, and that the robber in the white coat and glasses was known to him only as "Kareem". Simon testified that he himself was known as "Arova".

Simon's position was that although the surveillance photos of the robber in the white coat and hat were "kind of hazy", someone who knew him could pick him out as appellant (T-II.671-2).

According to Simon, when the robbery was being planned, appellant had advocated using a demand note, rather than guns, while Simon argued for the use of guns and Simon's arguments prevailed (T-II.487). He testified that Garris had a .38 on the day before the bank robbery (T-II.528-9), but counsel has been unableto locate any specific testimony in the record to the effect that a .38 was taken into the bank.

Appellant did not know how to drive (T-II.489), but "Kareem" had a car which, it was agreed, would be used for the robbery. Although Simon had ridden in "Kareem"'s car, Simon claimed he did not know the make or the model or the year or which state the plates were from (TOII.492,668). On May 9, 1975, however, a week before the robbery, "Kareem"'s car crashed and was abandoned. "Kareem" said he could get another car (T-II.521-532).

According to Simon, on the morning of the robbery, "Kareem" and appellant arrived with the getaway car. Simon

denied having seen that car before or ever knowing its owner (T-II.537).

All four men entered the car, with appellant sitting in the left rear seat (T-II.537).

They went to pick up the shotgun. Appellant got out of the car, came back, and, on the way down to the bank, again sat in the left rear seat (T-II.543).

After the robbery, only Simon and Garris rode in the back of the car (T-II.547,551).

It was "Kareem" who shot Mrs. Aponte, the teller (T-II.572). And it was "Kareem" who had obtained the white coats worn by the other two robbers (T-II.578).*/

Uptown, after the robbery, each of the four men got a $1,500 share, and "Kareem" took an additional $4,000 to buy a car for the four of them. "Kareem" departed and Simon claimed he never saw "Kareem" again (T-II.588,562-3,576).

Simon maintained that he had no idea what "Kareem"'s real name was, that he never knew "Kareem"'s address, or even which borough he lived in, that "Kareem"'s car had been a two-door, even though the robbers had wanted a four door**/, that although he told authorities that "Kareem"'s car was white and maroon and had been abandoned on a parkway in Queens on the night of May 9, the authorities were unable to find it (T-II.572-5).

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*/ The white coats were concededly not hospital coats. They were uncontestedly butcher coats, and said "meat market" on them (T-II.579). The government, in its petition for re-hearing, misled this Court by omitting the fact that they were meat market coats, and by suggesting instead that they were hospital coats, readily accessible to appellant, who worked in a hospital. Petition, at p. 3.

**/ Brown's car was a four-door.

Simon insisted that he had no idea whare "Kareem" was or what had become of the $5,500 which he claimed "Kareem" had taken (T-II.576).

Simon was surprised when he received the 18-year sentence; it was more than he expected and he was not satisfied with his lawyer (T-II.605,6). His understanding of his deal with the government was that it would be up to Sagor to tell Judge Duffy whether he was satisfied with Simon's testimony (T-II.630,1).

Simon was arrested for the instant case on June 17, 1975. On that day, Agent McLaughlin showed him surveillance photos of the robber with the white coat and hat. When McLaughlin said "That's Cecil Robinson", Simon said "No". (T-II.689,698-9).

McLaughlin then showed Simon known photos of Garris and of Carson Corley,*/ and Simon denied knowing either of them (T-II.690). Then McLaughlin showed Simon a surveillance photo of the robber with the white coat and glasses and a mug shot of Corley and asked if they were both photos of the same person. Simon said they were not (T-II.690,702-3). Simon testified that he did this to protect Corley, whom he claimed was innocent (T-II.704).

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*/ Corley, a convicted bank robber, had been named in the instant bank robbery by two FBI informants (T-II.44-7). His mug shot was chosen, from a photo spread, by the eyewitnesses Hall, Kohn, Gray and Lee (T-II.76-80). Corley's Federal parole officer said that the surveillance photo of the robber with the white coat and glasses very closely resembles Corley (T-II.85-6). Corley was arrested the same day as Simon and was charged with the instant bank robbery. He was later released, based partially on Simon's failure (or refusal) to identify him (T-II.54).

McLaughlin, not Simon, was the first to mention appellant's name, and Simon learned from this that the FBI was interested in appellant (T-II.699), and, after being confronted with a surveillance photo in which he saw himself, Simon decided to agree with McLaughlin that appellant was involved (T-II.691), but he did not implicate appellant when interviewed by an assistant U.S. Attorney later that same day (T-II.692). On the witness stand, Simon claimed that on June 17 he had told partially truth and partially lies (T-II.700).

Simon denied that "Kareem" was really Carson Corley and that he was trying to protect a guilty Corley (T-II.705). He acknowledged that the first time he ever admitted his own participation was when he told McLaughlin that Corley, whom he claimed he did not know, was not involved in the robbery, but Simon insisted that he implicated himself to protect an innocent Corley, whom he did not even know (T-II.706).

Harvey Erdsneker, registrar of Bronx Community College, testified that the Spring 1975 term ran from February 4, 1975 to May 21, 1975, followed by exams from May 22 to May 29. (T-II.721). Appellant was enrolled in the medical lab technology program; and was registered for four courses. He had classes on Mondays and Wednesdays, from 12:10 p.m. to 9:30 p.m. Appellant and Otis Brown were indeed registered together in the spring of 1975 in the same writing course, which was the last class on Monday and Wednesday evenings. (T-II.761).

The Court heard more argument on the question of the July 25 gun. Appellant noted that the July gun had never been linked to the bank robbery, that there were literally millions of .38's in existence and that the prejudicial effect of the gun was devastating. Since the government's theory was apparently that the July gun showed only access to guns or opprotunity to commit the crime, appellant's counsel stated that:

> I am willing to give the Court on the record my representation that I will make no.... argument in summation to the effect that Mr. Robinson couldn't do the bank robbery because he had no access to guns.
>
> (T-II.753)

Judge Bryan decided to let testimony about the July 25 gun into evidence.

Detective Clyde Foster, of the New York Police Department testified that on Friday, July 25, 1975, he arrested appellant at the personnal department of Gouveneur Hospital, while appellant was receiving his paycheck. After moving appellant ten steps over to a wall and frisking him, Foster looked back to where appellant had been and saw a vinyl case on the floor (T-II.7 Inside was a .38 Colt with 2 live bullets (T-II.764).

Appellant had only $6.30 in his possession and weighed 140 lbs. (T-II.768-9).

Carolyn Garcia, employed by the Human Resources Administration and formerly the coordinator of PSCP, testified that appellant knew Garris (T-II.776).

Joseph Blackwell, also employed at HRA, testified that appellant knew Garris (T-II.788-9).

(3) The Prosecutor's Summation

The strongest argument in Sagor's summation - the one which appeared to be irrebuttable - was that since appellant was the only one who knew Otis Brown, it was too much of a coincidence to believe that Brown's car had been stolen, by coincidence, by someone other than appellant, and that the only logical conclusion was that appellant had stolen Brown's car:

> You have heard Mr. Brown's testimony that he didn't know Mr. Simon. He said he never saw him before.
>
> (T-II.884)

> The important thing here is which of Simon's friends knew Otis Brown? Mr. Brown told you who. It was Mr. Robinson.
>
> (T-II.904)

> Who knew about [Brown's] car? That's the point. Robinson had the getaway car or knew about the getaway car.
>
> ***
>
> You know, out of all the stolen cars that occur in the City of New York...this particular car was used in the bank robbery...that is not a sheer coincidence. That's an impossible coincidence.*/
>
> (T-II.905)

Sagor also bolstered up this argument with a series of improprieties in his summation:

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*/ The argument was a strong one, but it was simply not true. Unknown to the Court, the jury or the defense, Simon had already told the government that he had twice met Brown and that on one of these occasions Garris had been present (T-II.1022-3). This was not revealed until the second day of jury deliberations. See POINT II, infra.

You will [note] that there was no alibi presented in this case...*/

MR. BERMAN: Objection, your Honor.

THE COURT: Let us not talk about that at all. The jury will disregard that as having nothing to do with the case, not a thing.

(T-II.887)

He vouched for Simon's credibility by giving the false impression that Judge Bryan had believed Simon:

You know [Simon] is not going to say something here and expect to be rewarded by Judge Duffy if it true; Judge Duffy, who will know from Judge Bryan what happened in this courtroom.

MR. BERMAN: Objection.

THE COURT: No; I think you better not go into that.

(T-II.895-6)

He argued that appellant could not shake Simon's story, even with the benefit of his attorney, who "is an expert cross-exami (T-II.899).

He made a thinly-veiled comment on appellant's not having testified:

Ladies and gentlemen, in this case if for one minute Mr. Robinson admits...to [his] being in the [bank surveillance] picture...then he can no longer deny it.

(T-II.900-1)

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*/ Sagor well knew that this comment was improper, for he himself had said, at the last pre-trial conference, that:

It is unethical for me to argue that you didn't contest something as if you had a burden to contest it. The Court of Appeals has said that defense counsel has no burden at all to say or argue anything.

(Minutes of 1/19/76, P. 60)

Appellant's motions for a mistrial were denied (T-II.907,8,981).

(4) The Court's Charge on the Gun*/

Appellant objected to the Court's proposed charge on the July 25 gun (T-II.869,873) and took exception after the Court gave it (T-II.1014).

The Court ultimately charged simply that the evidence of the July 25 gun:

> ....may be considered only for whatever value, if any, it has on the issue of defendant's iden ity as one of the robbers...
>
> (T-II.1007)

Appellant argued that this was too simple, that it permitted the jury to find that appellant had used the July 25 gun in the bank robbery, and that the Court should have charged, instead, that the July 25 gun might prove "access to guns" (T-II.870).

(5) The Developments During Deliberations

Deliberations began on January 28, 1976. Later that afternoon, the jury asked to have read to it Blackwell's testimony on the friendship between appellant and Garris, and Brown's testimony on his knowledge of Garris (T-II.1017).

(Obviously, if the jury had either believed Simon's direct testimony that appellant robbed the bank with him, or had been convinced that appellant was in the "hazy" surveillance photos, there would have been no need for this request, or for the ones that followed, or for lengthy deliberations.)

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*/ The entire text of the charge on the gun is at T-II. 1007, and is reproduced in Appellant's Appendix as part of Item C.

On the morning of the second day of deliberations, Sagor revealed that, prompted by the jury's request of the previous day and by prodding from appellant's counsel, he had phoned Simon that previous night (January 28). Simon told Sagor that he had indeed met Brown, at Harlem Hospital, in late 1974 or early 1975, when Brown was introduced to him not as Brown, but as "Hakim", and when Simon was introduced only as "Arova". Simon also saw Brown on another occasion, and Garris was present on one of those two occasions (T-II.1022).

Moreover, Simon maintained that he had previously told this to Sagor.

Sagor also revealed that during appellant's first trial, Simon had seen Brown, in the courthouse, while McLaughlin was present, and that Simon at that time had told McLaughlin that he had met Brown at the hospital (T-II.1023-4).*/

Appellant moved for a mistrial, arguing that these facts were exculpatory to appellant, in that they negated the government's strong argument that appellant had been the sole possible link to Brown, and, thus, to Brown's car. Appellant insisted that the government had had a duty to inform the defense of these facts prior to the trial (T-II.1024-5). The motion was denied (T-II.1027).

The government offered to make a mid-deliberations stipulati and appellant, in view of the denial of his mistrial motion, agreed

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*/ McLaughlin had been seated with Sagor throughout the re-trial (T-II.1). As Sagor himself noted in summation, "he is the FBI agent at my right" (T-II.890).

(T-II.1028, 1030). Meanwhile, the jury asked to have all the fingerprint testimony re-read (T-II.1031).

The Court refused to give any instruction to the jury or to give either side's proposed stipulation, or to allow anything other than a mutually-agreed stipulation. Appellant was thus forced to agree to the government's version of the stipulation, which went to the deliberating jury (after the fingerprint testimony was re-read) as follows:

> Counsel have stipulated that if Mr. Simon were recalled to the stand, he would testify that in late 1974 he was once introduced to Otis Brown by Robinson on the ground floor of Harlem Hospital. Simon was introduced as Arova, and the name "Simon" was not mentioned. Edward Garris was present at that introduction but was not introduced.
>
> Simon would also testify that he saw Brown from a distance at Harlem Hospital on a subsequent occasion.
> (T-II.1035,6)

The jury left the courtroom at 12:10 p.m., and at 3:25 p.m. it sent a note saying, "We are deadlocked..." (T-II.1030).*/ Over appellant's objection, the Court announced that it would give an Allen charge and the jury was called in.

> THE COURT: Is it your view, Mr. Foreman, that you are really hopelessly deadlocked?
>
> THE FOREMAN: Yes, your Honor.
>
> THE COURT: There would be no further hope in continuing your deliberations?
>
> THE FOREMAN: I believe it will stay as it is, your Honor.
> (T-II.1038)

The Court then gave an Allen charge.

At 5:45 p.m., a note (Court's Exh. 9) from a juror arrived. The Court ordered it sealed, without revealing its contents to counsel (T-II.1040,42).

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*/ The note also contained the jury's vote, which the Court did not reveal.

At 6:30 p.m., the Court asked counsel what they wanted to do, and, unaware of the contents of the note, counsel agreed that deliberations should continue. The case was then adjourned to the following morning (T-II.1040-1).

At 9:45 the next morning, the Court told counsel only that the juror's note of the previous day was "with regard to her state of mind, as it were, and asking for advice." Appellant's counsel responded that, "without knowing what is in her note, I can't comment too intelligently..." (T-II.1042). The Court again gave an Allen charge (T-II.1043).

At 2:45 p.m. the jury found appellant guilty on Count 2.*/

After the verdict, it was learned that in the sealed note of the previous day, the juror had written that she had a "strong reasonable doubt" and had asked the Court what he should do.

ARGUMENT

POINT I

THE COURT, IN THIS SINGULAR, VERY CLOSE CASE, ERRED IN ADMITTING EVIDENCE OF THE JULY 25 GUN, BECAUSE ITS PREJUDICIAL EFFECT FAR OUTWEIGHED ITS PROBATIVE VALUE, AND BECAUSE THE RAVICH CASE DISCOURAGES, RATHER THAN PERMITS, SUCH EVIDENCE IN A CASE WHERE THE PROOF IS FAR FROM OVERWHELMING. MOREOVER, THE COURT'S CHARGE ON THE GUN WAS TOO VAGUE TO BE OF ANY ASSISTANCE TO THE JURY OR TO ASSUME THAT THE JURY DID NOT MISUSE SUCH EVIDENCE.

A reading of the entire record of this very close

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*/ Counts 1 and 3 were then dismissed on appellant's motion, with the government not opposing.

case*/ including the transcripts of both trials, clearly shows that the prosecutors were desperately trying to get the July 25 gun before the jury. They first argued that it showed "consciousness of guilt". Then they argued that it showed an opportunity to commit

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* As the panel's opinion eloquently observed, the prosecution's case against appellant was a

> 'less than airtight' case, particularly the fact that none of the eight nonparticipant eyewitnesses could identify appellant, the three days of jury deliberations and two Allen-type charges required to produce a verdict of guilty, and the fact that a jury had previously hung in the absence of admission of the gun.

544 F.2d at 619-620

We also cite, as indicia of the closeness of this case, the fact that the surveillance photos were "hazy", the serious impeachability of Simon, the very plausable innocent explanation for appellant's fingerprints in the car of his classmate Otis Brown, the "strong reasonable doubt" expressed in the unrevealed note from the juror, the powerful untruth in the prosecutor's summation to the effect that only appellant knew Brown (see POINT II, infra), and the improper shifting of the burden of proof on the issue of alibi (see POINT III, infra).

the crime. Then they argued to the Court that it was indeed one of the guns actually used in the bank, although the Court specifically ruled that there was insufficient proof to permit such an argument.

Judge Duffy, after hearing argument and after reading the government's memorandum of law, refused to let the gun in. When the case was reassigned to Judge Bryan for the second trial, the government tried again. The conclusion is inescapable that the prosecution wanted the jury to hear that appellant was the type of man who would have a gun in his possession. The prosecution knew, especially after the first trial, that the gun would make all the difference. As Hoskins had himself conceded in his memorandum, the case was far from being an overwhelming one. If the gun would come in, the government's case would be bolstered, because appellant's character would thus be discredited and the jury might take the proof of the crime of possession of a gun in late July as proof of the crime of bank robbery ten weeks earlier. Especially if the Court, in its charge, failed to carefully instruct the jury on how to use so risky a piece of evidence. And, of course, that is just what happened.

It must be recalled that this case was a very close one. Even Simon described the surveillance photos of the robber in the white coat and hat as being "hazy", and Simon himself was a very impeachable witness, in terms of his own character, and because he had previously denied that appellant was involved and had only recently made a deal to get out from under a 18-year sentence, and because of his unexplained urge to confess in order to protect Carson Corley.

That the case was a close one can also be seen from the fact that the first jury hung, 8-4, and from the fact that the second jury was out three days on a one-issue case and reported itself to be hopelessly deadlocked, with one juror later having a "strong reasonable doubt" and not knowing what to do.

The case was also close because the fact that Otis Brown had previously driven appellant in his car seriously undercut the probative value of the fingerprint in Brown's car, and because the surveillance photos showed that the robber with the white coat and hat wore gloves, and because Simon's testimony placed appellant in the wrong position in the car to leave his print on the right rear lighter panel that day.

Also, the evidence as to the July 25 gun, which came in at the second trial, but not at the first trial, was clearly the only serious evidentiary difference between the two trials*/, and appellant was not found guilty at the first trial.

The government argued, unsuccessfully with Judge Duffy and then successfully with Judge Bryan, that the gun should come in under United States v. Ravich, 421 F.2d 1196 (2nd Cir. 1970). But a careful reading of Ravich shows that this Court, in Ravich, seriously discouraged rather approved of letting in such potentially inflammatory evidence as weapons possessed on a later occasion,

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*/ See 544 F.2d at 614, N.3.

especially where the proof of guilt is far from overwhelming.*/

Ravich himself was "unhesitatingly identified" by five eyewitnesses (421 F.2d at 1198), not to mention the testimony of an accomplice, proof of flight to and apprehension in Louisiana, and possession of large, unexplained sums of money. What this Court held in Ravich was merely that "in view of the overwhelming evidence that the defendants were the robbers", the Court had not abused its discretion in letting the guns in. (421 F.2d at 1204-5).

In the instant case, by comparison, there were no non-participant eyewitnesses who identified appellant. When arrested, appellant was picking up his paycheck at Gouveneur Hospital in Manhattan and he had only $6.30 in his possession. Simon, as previously noted, was severely impeached and obviously neither Simon nor the surveillance photos readily persuaded either jury.

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*/ We agree, of course, with the panel's opinion that the case against appellant was "less than airtight" (544 F.2d at 619), and we believe that we have clearly demonstrated that the prosecution's proof was far from overwhelming, especially in the light of the several serious improprieties set out in POINTS II, III and IV, infra.

At the same time, we think it is significant that at different points in time, the government has been speaking out of different sides of its mouth on the question of the strength of its proof: When it was trying to persuade the trial Court that it desperately needed to get the gun evidence before the jury, the prosecution called its case "far from...overwhelming" and "not overwhelming". Now, in a desperate petition for rehearing, the government tells this Court that its evidence "overwhelmingly pointed to [appellant's] guilt."

Even in Ravich, where the other evidence was overwhelming, this Court indicated that the wiser course "might well have" been to exclude the guns. 421 F.2d at 1204. In the instant case, where it seriously appears that the July 25 gun made all the difference, it was an abuse of discretion to let proof of that gun be heard by the jury.

In addition, the failure of the Court to give a limiting instruction at the time the testimony about the gun was received was plain error. United States v. Bobbitt, 450 F.2d 685 (D.C. Cir. 1971); United States v. McClain, 440 F.2d 241 (D.C. Cir. 1971); United States v. Apollo, 476 F.2d 156 (5th Cir. 1973).

Moreover, the Court's charge on how the gun could be used was so vague and so general that it really did not tell the jury how it could permissibly use that potential inflammatory item of evidence:

> It may be considered only for whatever value, if any, it has on the issue of defendant's identity as one of the robbers....
> (T-II.1007, emphasis added)

It would appear from this Court's opinion in Ravich that a gun possessed ten weeks after a bank robbery, a gun which cannot be proven to have been used in the robbery, should usually not be received in evidence, and that on the rare and ill-advised occasions when a judge does let such evidence in, the theory by which it comes in, and the theory which the judge must charge is:

> Direct evidence of such possession would have been relevant to establish opportunity or preparation to commit the crime charged....
> (Ravich, supra, 421 F.2d at 1204, emphasis added)

Appellant's counsel sought to avoid having proof of the gun come in on such a theory by promising, on the record, not to argue that appellant was a person who did not have access to guns. 544 F.2d at 615, n.4. The Court did not accept this solution and chose to let proof of the gun in. But the least it could have done was to tell the jury, as appellant requested, that the way to use this piece of evidence was limited solely to the jury's determination of whether appellant had access to a gun and thus whether he had an opportunity to commit the robbery.*/ This the Court refused to do, and its vague charge on the "issue of identity" left that second jury, in this very close case, free to find that appellant was the robber because he was a person who carries guns, or because he was of bad character. The Court's charge effectively let the prosecution do the impermissible, that is to:

> ...introduce evidence of criminal character or generally of the commission of a crime on one occasion to prove the commission of a crime on another.
>
> (Ravich, supra, 421 F.2d at 1204)

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In this "singular case"**/, this Court en banc should

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*/ The government, in its petition for rehearing (at p. 8, second footnote), seeks to make the argument that the jury could have used the gun evidence as proof of access/opportunity. But the fact remains that Judge Bryan never charged the jury on any such theory.

**/ 544 F.2d at 613.

confirm the opinion of the panel in terms of its reasoning*/ and its result, and the judgment herein should be reversed. First, because in so close a case, where the gun evidence concededly made all the difference, and where a prior judge had heard all the same arguments and had excluded the gun, it was an abuse of discretion for the second judge to admit that same evidence. Second, because of the plain error of the absence of a limiting instruction

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*/ The government, at p. 12 of its petition, argues that:

> The panel majority's opinion is most seriously flawed in that it makes no mention of, let alone attempts to distinguish,...United States v. Wiener, 534 F.2d 15 (2d Cir. 1976) and United States v. Campanile, 516 F.2d 288 (2d Cir. 1975)....
> (emphasis added)

Initially, we cannot help but note that the government's original brief on appeal in this case must also be deemed "most seriously flawed", for it, too, "makes no mention" of Campanile.

As for distinguishing these two cases, the Luger in Campanile was admitted not as an unrelated gun, but because it was the very same Luger which Campanile himself admitted taking with him to Vermont (the scene of the larcenies). 516 F.2d at 290. And the panel in Campanile expressed serious hesitation, noting that "this evidence was on the borderline of admissibility in view of its tendency to create unfair prejudice." 516 F.2d at 292. Moreover, the evidence of guilt in Campanile was clearly stronger than the evidence against appellant in the instant case.

As for Wiener, the gun therein was clearly related to the crime, for it was found on the same day as the crime and in the very same bag as the narcotics themselves. 534 F.2d at 18. Appellant's gun, of course, was found in an unrelated context, ten weeks after the crime.

at the time the evidence came in. Third, because nowhere in its charge did the Court instruct the jury affirmatively on the specific purported proper way to use that evidence.*/ Fourth, because of the unique situation herein concerning the sealing of the juror's "strong reasonable doubt" note and the Court's inappropriate sua sponte decision to repeat the Allen charge after it knew there was a "lone holdout". Fifth, because the judgment herein is, in any event, tainted by other serious errors and improprieties (see POINTS II and III, infra). Finally, because the panel's opinion carefully limited itself to the facts of this "singular case", and thus was consistent with the prior decisions of this Court and did not create any earthshaking new precedent or any of the "serious consequences"**/ which the government is quick to predict in the reversal of virtually any criminal conviction.

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*/ In essence, the Court first told the jury it could use the gun evidence any way it wanted on the issue of identity (which was the entire issue in this case). Then it told the jury one way in which it was not to use the evidence. Then it repeated that the jury could do virtually whatever it wanted with that evidence. 544 F.2d at 619, n.12, last paragraph.

**/ Petition, at p. 15.

The panel's opinion should be confirmed by this Court en banc, and the judgment below should be reversed and a new trial ordered.

POINT II

THE FAILURE OF THE GOVERNMENT TO DISCLOSE THAT SIMON AND BROWN HAD MET AND THAT GARRIS HAD ALSO BEEN PRESENT PERMITTED THE PROSECUTOR TO ARGUE A POWERFUL UNTRUTH IN HIS SUMMATION, TO WIT, THAT ONLY APPELLANT KNEW BROWN. THE MID-DELIBERATIONS STIPULATION FAILED TO CURE THIS INJUSTICE, FOR APPELLANT REMAINED DEPRIVED OF HIS RIGHTS TO DEVELOP AND CONFRONT THESE LATE-REVEALED FACTS AND HIS RIGHT TO ARGUE FROM SUCH FACTS. */

Simon, called by the government, testified that he did not know Brown, the owner of the getaway car. Brown, also called by the government, testified that he did not either Simon or Garris. From this evidence, the prosecutor argued, very persuasively, that appellant was the only one who knew Brown and that, absent some incredible coincidence, Brown's car must have come to the robbers via appellant.

Although this argument was indeed powerful, it was apparently a lie, for the government knew, but had not disclosed to appellant, that Simon had indeed twice met with Brown, that Brown was introduced to Simon as "Hakim", and that Simon was introduced to Brown as "Arova", and that Garris was also present on one of those occasions.

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*/ This point, of which the government made no mention in its petition for rehearing, was specifically left undecided by the panel, in view of its reversal on POINT I, supra (see 544 F.2d at 621, n.15). We stress that while this point serves to underscore the uniqueness of the fact pattern in appellant's case as it relates to the effect of the admission of the gun evidence, we argue that even if this Court en banc were not to adhere to the panel's opinion on the gun point, a reversal of the judgment herein is nonetheless independently required because of the serious Brady violation demonstrated here in POINT II.

The government knew this for quite a while, for Simon had told it to McLaughlin, the case agent, during the first trial. McLaughlin sat with Sagor, in Court, literally as Sagor's right hand man, throughout the second trial (T-II.890), and Simon also claimed that he had revealed these same facts directly to Sagor prior to the time the case went to the jury.

That the above-described failure to disclose evidence which was directly exculpatory to the government's theory of its case constitutes a violation of Brady v. Maryland, 373 U.S. 83 (1963), is virtually beyond dispute. United States v. Morell, 524 F.2d 550 (2d Cir. 1975); United States v. Hilton, 521 F.2d 164 (2d Cir. 1075); United States v. Seijo, 514 F.2d 1357 (2d Cir. 1975); Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959).

Indeed, it is really unnecessary to cite cases to this Court on this point, for the very obvious proof that the government realized its own sin in not disclosing this information about Brown, Simon and Garris*/, can be seen in Sagor's eagerness and willingness to patch up the record below with a mid-deliberations stipulation:

> MR. SAGOR: I don't think there is any substance to any Brady motion, to begin with, but to eliminate any possible claim, I think I would be prepared to enter into that stipulation to avoid any claim.
> (T-II.1028)

Thus, the question before this Court really boils down to one of whether the mid-deliberations stipulation, entered into

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*/ Quite obviously, the information should have been disclosed to appellant during the first trial.

after the denial of appellant's motion for a mistrial, cured the harm brought about by the government's exploitation of its earlier Brady violation.

The answer must be that the mid-deliberations stipulation, which was all that the Court or the government were willing to allow at that point, could not and did not cure the problem, because the stipulation still left appellant deprived of his constitutional rights to confront that additional evidence, to develop that additional evidence (such as, by asking both Brown and Simon whether they ever discussed Brown's car), and, most important, to argue to the jury that the additional evidence undercuts the strongest argument which the prosecutor made in his summation. Herring v. New York, 422 U.S. 853 (1975).

> There can be no doubt that closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial.
>
> (Herring, supra, 422 U.S. at ____.)

Appellant's conviction, in this close case*/, came at a trial where the government was able to argue a theory which was a lie, and, when the barest skeleton of the truth was finally stipulated to, it was too late for appellant to develop the details of that truth or to argue from it in his summation.

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*/ See POINT I, supra.

The judgment should be reversed and the indictment dismissed*/.

POINT III

THE PROSECUTOR'S SUMMATION IMPROPERLY SHIFTED THE BURDEN OF PROOF TO APPELLANT ON THE ISSUE OF ALIBI.

Sagor argued to the jury:

> You will [note] that there was no alibi presented in this case...
>
> (T-II.887)**/

The effect of this argument was to shift the burden of proof to appellant, to make the jury wonder why appellant had not testified or why the defense had not "presented" some proof of an alibi. Surely Sagor was not arguing that it was the prosecution that had failed to "present" any proof of alibi.

Such a shifting of the burden of proof to a defendant in a criminal case clearly violates due process, as the Supreme Court recently reaffirmed in Mullaney v. Wilbur, 421 U.S. 684 (1975) See also, In Re Winship, 397 U.S. 358,361 (1970); Speiser v. Randall, 357 U.S. 513,526 (1958).

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*/ See, United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972) [Friendly, C.J.] ("We cannot, with proper respect for the discharge of our duties, content ourselves with yet another admonition; a reversal with instructions to dismiss the indictment may help translate the assurances of the United States Attorneys into consistent performance by their assistants.")

**/ It is clear that Sagor knew that such an argument was improper and unethical, for he himself had earlier stated:

> It is unethical for me to argue that you didn't contest something as if you had a burden to contest it. The Court of Appeals has said that defense counsel has no burden at all to say or argue anything.
>
> (Minutes of 1/19/76, p. 60)

More specifically, imposing upon the defense the burden of proving an alibi violates due process and is reversible error. Smith v. Smith, 454 F.2d 572 (5th Cir. 1972), cert. denied, 409 U.S. 885; United States v. Booz, 451 F.2d 719, 721,2 (3d Cir. 1971); Stump v. Bennett, 398 F.2d 111 (8th Cir. 1968), cert. denied, 393 U.S. 1001.

In the instant case, the Court, after appellant's immediate objection to Sagor's alibi argument, told the jury:

> Let us not talk about that at all. The jury will disregard that....
> (T-II.887)

The above instruction was clearly insufficient to cure the damage done. The proper immediate instruction might have been one to the effect that the defendant has no such burden. The Court gave no such immediate instruction, and to give one later, after the summation was over, would have served only to remind the jurors of the gnawing alibi question which Sagor had raised and which could only be properly cured by the granting of a mistrial.

The prosecutor's other improprieties in summation all compounded the injustice done to appellant by the alibi argument. Sagor called appellant's counsel "an expert cross-examiner"*/

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*/ The government, in its original brief on appeal, pretends that "[h]ow such praise could be prejudicial to Robinson...is difficult to discern" (at p. 19). We hope that this Court en banc will not find it difficult to discern how a comment to the effect that a defendant 'has a very clever lawyer' might easily prejudice that defendant in the eyes of a jury.

frustrated by Simon's allegedly unassailable truthfulness (T-II.889); he suggested that Judge Bryan had believed Simon (T-II.895,6); and he made a very thinly veiled comment ("if for one minute Mr. Robinson admits") on appellant's not having testified (T-II.900,1). See Chapman v. California, 386 U.S. 18 (1967

The totality of these improprieties, especially the alibi argument, should not be tolerated by this Court, especially in so close a case, where the first jury had hung, where the July 25 gun was used to inflame the jury (POINT I, supra), and where appellant was deprived of developing and arguing the exculpatory evidence which rebutted the government's strongest argument (POINT II, supra).

The judgment should be reversed and the indictment dismissed.

POINT IV

THE COURT ERRED IN NOT PROMPTLY REVEALING TO COUNSEL THE CONTENT OF THE JUROR'S NOTE, IN NOT ANSWERING THE JUROR'S INQUIRY, AND IN GIVING, INSTEAD, A SECOND ALLEN CHARGE.

On the afternoon of the second day of deliberations, the Court received a note from a juror and, without revealing its contents to counsel, ordered the note sealed.*/ Later that day, the Court asked counsel if they wanted the jury to continue its deliberations (T-II.1040,1). Appellant's counsel, not knowing

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*/ Counsel could only assume then that the note dealt with some unrelated personal matter or that it revealed the jury's vote. When deliberations continue as long as they did in this case, jurors often send the Court personal notes, asking for (free) coffee, expressing concern that their cars will be locked in when the parking lot closes, asking that their families be informed that the jurors will not be home for supper, etc. As the panel opinion held,

> Because of ignorance of the note's contents, appellant's counsel did not possess the information that could have

(Fn. Cont'd. Next Page)

what was in the note, agreed that deliberations should continue.

It was not until the following day that the Court, still keeping the note sealed, told counsel that the note was "with regard to her state of mind, as it were, and asking for advice." Appellant's counsel responded:

> Without knowing what is in her note, I cannot comment too intelligently....
> (T-II.1042)

The Court decided to answer the note by again giving an Allen charge, as it had done the previous day, before the arrival of the note.

Only after the verdict did counsel learn that the juror, in her note, had stated that she had a "strong reasonable doubt" and had asked the Court what she should do.

The Court erred in not promptly revealing to counsel the content of the note. United States v. Dellinger, 472 F.2d 340, 380 (7th Cir. 1972); United States v. Rodriguez, 545 F.2d 829 (2d Cir. 1976). Prior to this particular note, the jury had already declared itself hopelessly deadlocked, and an Allen charge had already been read to it. If the Court had promptly made counsel aware of the content of the note, obviously appellant would not have consented to the continuation of deliberations, but would, instead, have either asked the Court to declare a hung jury or would have proposed to the Court a supplementary instruction on reasonable doubt as an answer to the juror's question. When a jury has questions, a Court should try, with the assistance of counsel, to formulate answers to those questions. United States

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(Fn. cont'd. from preceding page)
prompted an informed initial objection to the sealing. Counsel did sufficiently object to the court's solution of giving the second Allen-type charge. (544 F.2d 620, n.13)

v. Peterson, 513 F.2d 1133 (9th Cir. 1975); United States v. Bolden, 514 F.2d 1301, 1308-9 (D.C. Cir. 1975). But without knowing what is in a note, as appellant's counsel noted, counsel "can't comment too intelligently."

Nor was the Allen charge responsive to the juror's question, which had come soon after an earlier Allen charge. Certainly, an Allen charge is not the answer to all possible questions:

> Like dynamite it should be used with great caution, and only when absolutely necessary.
>
> United States v. Flannery, 451 F.2d 880,883 (1st Cir. 1971)

Here, where the Court knew that the vote was 11-1, "dynamite" was neither appropriate nor necessary.

Indeed, while respectfully referring this Court en banc to the panel opinion's scholarly discussion of this point (544 F.2d at 620-1), we note that the panel itself observed that:

> ...a case involving two Allen charges, following the judge's awareness of a 'lone holdout' situation like the present one, has apparently not arisen.
>
> (544 F.2d 620, n. 14)

We also cannot help but note that the government, in its petition for rehearing, makes absolutely no mention of the issues of the juror's note or the Allen charges, or of the panel opinion's specific criticisms of the manner in which the trial court handled these issues.

The Court's failure to reveal to counsel the content of the note, the Court's failure to respond to the juror's question, and the Court's decision instead to answer the note by giving another Allen charge after it learned of the lone holdout, only

served to compound the aforementioned errors, requiring reversal of the judgment herein.

CONCLUSION

THE PANEL's OPINION SHOULD BE CONFIRMED AND THE JUDGMENT SHOULD BE REVERSED AND THE INDICTMENT DISMISSED OR, IN THE ALTERNATIVE, A NEW TRIAL BE ORDERED.

Respectfully submitted,

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March, 1977.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

STUART GOLDFARB, being duly sworn, deposes and says:

That on the 3rd day of March, 1977, I served the within Appellant's Brief on Rehearing en banc upon Robert B. Fiske, Jr. Appellee, attorney for in this action, at 1 St Andrews Plaza, NY NY 10007 the address designated by said attorney for that purpose, by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Stuart Goldfarb

Sworn to before me this
3rd day of March, 1977.

[illegible]
Notary Public, State of New York
No. 24-[illegible]
Qualified in New York County
Commission Expires March 30, 1978